

DOUBLE JEOPARDY — Does not bar retrial after reversal on appeal for trial error

— Revised 11/09

When a case is reversed on appeal for trial error, double jeopardy does not bar the State from retrying the defendant “because jeopardy is treated as continuing through the appeal process and a defendant waives double jeopardy protection by the fact of the appeal.” *State v. Sanders*, 205 Ariz. 208, 223, 68 P.3d 434, 449 (2003). In *Burks v. United States*, 437 U.S. 1, 15 (1978), the Supreme Court held that reversal for incorrect instructions does not mean that the prosecution has failed to prove its case but only constitutes a determination that the defendant was convicted through defective process. The Court of Appeals recognized this rule in *Korzep v. Superior Court*, 172 Ariz. 534, 541, 838 P.2d 1295, 1302 (App. 1991):

United States v. Tateo, 377 U.S. 463, 84 S.Ct. 1587, 12 L.Ed.2d 448 (1964) held that a retrial to correct trial error is permissible because “it would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.” See also *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) (double jeopardy clause does not act as a bar to the retrial of a defendant who has successfully appealed a conviction unless the conviction was reversed on the grounds of insufficient evidence); *Hoffer v. Morrow*, 797 F.2d 348 (7th Cir.1986) (when conviction is overturned because of trial error, state is free to retry defendant until he is convicted in error-free trial); *Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986) (where conviction is reversed on appeal, double jeopardy clause does not forbid retrial and, thus, the original decision is nullified and the slate wiped clean on remand); *State v. Porras*, 133 Ariz. 417, 652 P.2d 156 (App.1982) (double jeopardy clause does not bar retrial of a defendant where reversal is based on an improper standard applied by the trial court).